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APR 26 2010

OFFICE OF PETITIONS

In re Application of
Michael TUCCI et al. et al.
Application No. 09/899,776
Filed: July 5, 2001
Attorney Docket No. 6845/59951-Z

: DECISION ON PETITION

This is a decision on the petition, filed March 3, 2004, which is being treated as a petition under 37 CFR 1.181 (no fee) requesting withdrawal of the holding of abandonment in the above-identified application. The delay in rendering a decision on this petition is regretted.

The petition is **DISMISSED**.

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. *Note* 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.181 to Withdraw the Holding of Abandonment."

This application was held abandoned for failure to reply to the Notice to File Corrected Application Papers (Notice) mailed August 24, 2001, which set a two (2)-month shortened statutory period for reply. A Notice of Abandonment was mailed on February 9, 2004.

Petitioner asserts that the Notice dated August 24, 2001, was not received.

A review of the written record indicates no irregularity in the mailing of the Office action, and, in the absence of any irregularity, there is a strong presumption that the Office action was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. In this regard, the showing required to establish the failure to receive the Office action must consist of the following:

1. a statement from practitioner stating that the Office action was not received by the practitioner;

2. a statement from the practitioner attesting to the fact that a search of the file jacket and docket records indicates that the Office action was not received; and
3. a copy of the docket record where the nonreceived Office action would have been entered had it been received must be attached to and referenced in the practitioner's statement.

See MPEP § 711.03(c) under subheading "Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action," and "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 Official Gazette 53 (November 16, 1993).

The petition fails to satisfy items (2) and (3) of the above-stated requirements in that the copy of the practitioner's record(s) required to show non-receipt of the Office action does not include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, **a copy of the docket report** showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. *See MPEP § 711.03(c)(I)(A).*

Accordingly, the petition requesting withdrawal of the holding of abandonment cannot be granted at this time.

If petitioner cannot supply the evidence necessary to withdraw the holding of abandonment, or simply does not wish to, petitioner should consider filing a petition under 37 CFR 1.137(b) stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$770 petition fee (\$1540 for a Large Entity). It is noted that the applicant has been charged \$750 as authorized in the petition. Should the applicant not elect to file a petition for revival under 37 CFR 1.137(b), the applicant may wish to request a refund of the \$750 fee. However, if the applicant wishes to file a petition under 37 CFR 1.137(b), the unpaid balance in the petition fee (\$20 in this instance) should be included with such a petition.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

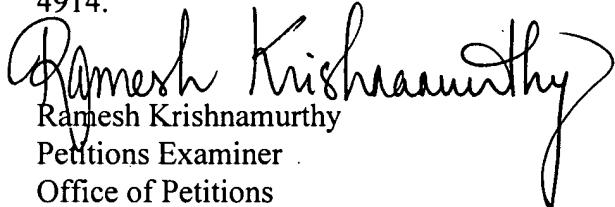
Further correspondence with respect to this matter should be addressed as follows:

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By facsimile: **(571) 273-8300**
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-4914.


Ramesh Krishnamurthy
Petitions Examiner
Office of Petitions

Enclosures: Petition For Revival Of An Application For Patent Abandoned Unintentionally
Under 37 CFR 1.137(b); Form PTO/SB/64, Privacy Act Statement.